

ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER. By *Doris M. Stenton*. Philadelphia: The American Philosophical Society, Pp. ix, 238.

Gradually we are coming to a fuller and better understanding of English law and its administration in the Earlier Middle Ages. From 1234 onwards we can trace the pattern with certainty, while before the reign of Alfred the pattern is indistinct, blurred and often lost to sight. What of the years between? If there will always be large gaps in our knowledge because documents fail us, with continued publication of the records that time has spared us, we shall emerge, not into full daylight, but still we shall emerge from the twilight in which we have long groped our way. The last forty years or so have seen valuable new editions of Anglo-Saxon charters, writs and wills; the revival of the Pipe Roll Society, and consequently the publication of the Pipe-rolls to the end of John's reign and a great deal else; many volumes of plea rolls from the Public Record Office; and other volumes from the Selden Society and local record societies. A beginning has been made on the long-neglected task of collecting and editing the charters and writs of the Norman and Angerlin kings. If much remains to be done in rendering accessible the wealth of sources in manuscript, it is not too soon to endeavour to retell the early history of English law with a fuller comprehension than was possible to Maitland writing three quarters of a century ago with less adequate materials. That the material should now be more adequate is due in large part to the devoted labours of Lady Stenton, and it is fitting that in a recent volume<sup>1</sup> she should survey the period from the Conquest to Magna Carta and give an account of the additions to our knowledge.

So little that is significant has been written over the last seventy years, that anyone attempting to follow Maitland is venturing upon still uncharted seas. He will have one great advantage that Maitland lacked, Liebermann's monumental edition of the Anglo-Saxon laws; but very largely he must find his way alone. He will make discoveries, even in long-printed books; he will see old facts in a new light; he may be called upon to challenge long-accepted dates, to reject long-accepted texts; the pattern of events will change under his eyes. But at the end his will be but a partial view. Another venturer setting sail upon the same seas will make other discoveries, will arrange facts and events in a different pattern. I speak from experience, for while Lady Stenton

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1. D. M. STENTON, *ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER* (1964).

has been on her own voyage of discovery, Professor Sayles and I have been on ours; and we have returned with different charts and rather different pictures of the coasts we have visited. It is therefore inevitable that I write now as a returned traveller who has followed parallel paths and who has sometimes beheld the prospect in a different light. And if I regret that in the course of our journey we could not have had Lady Stenton's book in our hands, it is perhaps not presumptuous or unkindly on my part to hope that she may learn something from two volumes of ours,<sup>2</sup> even if it is no more than a small detail that we were fortunate enough to notice before she did. But I hasten to mention another venturer, Professor R. C. van Caenegem, whose survey of writs and the writ process from the Conquest to the end of Henry II's reign appeared in 1959.<sup>3</sup> Mr. van Caenegem is indeed constantly in Lady Stenton's mind, and a good many of her pages read like a dialogue between the two scholars. Differing as I do from both of them on a number of points, I can hardly say who has the better of the argument. My sympathies—if that is the right word—veer, though my appreciation of their devoted scholarship is given in equal measure.

Inevitably, if one begins to tell the story of English law from the Conquest onwards, one must glance at the preceding century. Where others have seen a great interruption with the coming of the Normans, Lady Stenton sees continuity. That this is the right view I have no doubt. The more we learn of the Old English polity, the less we are likely to rate the extent of the changes after 1066. In law, no less than in all other aspects of society, there was continuity—granted the initial upheaval caused by the dispossession of nearly the whole of the high ranking propertied class. The survival of the shire-court and hundred-court must imply the survival of the English legal system. The evidence that Lady Stenton adduces for the survival of the *sacrabar* points in the same direction. The local justice, who was certainly in office under William Rufus, also looks like a survival. And a growing number of scholars reject Brunner's thesis that the Normans brought the jury with them and believe that the debt was the other way round. There would seem to be no doubt about survival, yet when we ask for evidence that the substantive law, as well as the framework of the law, survived practically unaltered, we are in some perplexity. It is quite clear that Court's code was well-known in the twelfth century, but to what extent it was living

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2. RICHARDSON, *THE GOVERNANCE OF MEDIAEVAL ENGLAND FROM THE CONQUEST TO MAGNA CARTA* (1963); RICHARDSON, *LAW AND LEGISLATION IN MEDIAEVAL ENGLAND FROM AETHEL-BERTH TO MAGNA CARTA* (1966).

3. VAN CAENEGEM, *ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL* (1959).

law is another matter. Again some often repeated beliefs in ancient survivals we must, I think, reject. Though twelfth-century law-books speak of the division of the country between three laws, of the West Saxons, the Mercians and the Danes, this is a piece of antiquarianism. We can trace this myth to a tract that comes from the reign of the Confessor. There is, it is true, an earlier reference to the three laws in Court's code, but solely with reference to royal rights: no reference is made to customary law. A statement made by an anonymous author that Middlesex fell within the Dane law and that Kent was subject to West Saxon law carries its own refutation. No one with real knowledge of local customs in England could ignore the peculiar customs of Kent, strongly marked and tenaciously held. The tract-writer was an imposter. When we find the same story repeated in law-books of the twelfth century, we know that the writers have not made diligent enquiry and that their learning is book-learning.

What then are we to make of these law-books, some so fantastically wrong-headed that we find it hard to tell their purpose, others with good grain intermingled with much chaff? Of the impetus that set this rather murky stream flowing, there can be no doubt. Henry I had given back to the English the laws of Edward. Well, what were Edward's laws? He had issued no code and Henry made no effort to ascertain what exactly he was granting. So a number of private persons took it upon themselves to supply the lack, and on the whole they made a sorry mess of the business. But the fabrications once started, there threatened to be no end to them. There is a spurious Assize of Clarendon. There are collections of apocrypha. But until the book we know as *Glanville* was written, there was no law-book produced that we can call wholly factual. One group which, with some latitude of language, we can class as Anglo-Saxon, has been edited with devoted care by Felix Liebermann, and his text and commentary are an invaluable basis for their study. Though Liebermann made his mistakes in dating and textual criticism, his guidance is indispensable and he furnishes the means for his own correction. Still his work must be approached with caution, and historians have perhaps been inclined to take too much on trust. As for the rest of the outpouring of the twelfth century, and especially the assizes, authentic and unauthentic, of Henry II, they await a skilled editor. For too long scholars have been content with the texts edited by William Stubbs upon principles very difficult to discern.

What the pre-*Glanville* law-books do not do is to take notice of the evolution of the writ process that was going on before their eyes. The writers live too much in an unreal world. They cannot be altogether

regardless of the present, but it is a tedious and uncertain task to seek what is historically valuable amidst so much that is of dubious authority or merely fictional. For the most part Lady Stenton puts this literature aside. If she has been misled by her occasional glances at these difficult texts, it is no great matter. She concentrates upon royal writs and the royal courts and gives us much to ponder. When, however, she turns in her fourth chapter to the reign of John, I feel that her tenderness for the king has sometimes led her astray. I cannot myself see any justification for John's closure of the royal courts during his absence in Ireland. The office of justiciar had been invented for just such an occasion, to secure the continuous administration of justice in the king's absence, and it had been employed in this way for a century and was later so employed by John himself. The only reason for his action on this particular occasion seems to have been his quarrel with the justiciar, Geoffrey Fitz Peter. Lady Stenton is positive that there was no quarrel; but she gives no adequate explanation of the king's failure to employ the justiciar when his services were most needed, and she dismisses the evidence of the *Minstrel of Bethune* with an assurance I cannot share.

Our difference appears to be largely due to her conception of the nature of the office of justiciar and the functions he performed before John was expelled from Normandy and became a stay-at-home monarch. This is illustrated, not only by her discussion of Geoffrey Fitz Peter, but also by her discussion of Ralf Basset, who is put forward as an occupant of the office under Henry I, though in what relation he stood to Roger of Salisbury is not explained. His activity as a judge is beside the point. What distinguishes Roger is that he is quite evidently the king's *alter ego*, issuing writs in his own name during the king's absence. Where are Ralf Basset's writs? Where is the testimony to his authority, such as we have from Bishop Herbert of Losinga, witnessing to his pre-eminence? And how could there possibly be room for a rival or partner to Roger? The history of the justiciarship has been obscured by much ill-advised conjecture and it is important to get the outline straight. The creation of the Exchequer and the office of justiciar was the essential feature in the organization of the judicature and the establishment of an impersonal monarchy, which distinguished England and Normandy from all other contemporary states. This sudden leap forward put Henry and his advisors in a place apart in the history of politics and from it sprung much that is peculiar to the English system of justice.

This is not the only or, perhaps, the principal point of difference between my view of the evolution of English justice and Lady Stenton's. I should emphasise the importance of the structure given to the judi-

cature, which seems to me fundamental to the changes that overtook the writ process. Lady Stenton lays great stress upon the change in the general form of twelfth-century writs which, to begin with, were commands to the sheriff to take action and did not follow the matter up further but which, under Henry II, required the writ to be returned to the king's court so that right might be done. The change is explicable if we consider the nature of the judicature under Henry I, Stephen and Henry II. The first and greatest of the justiciars, Roger of Salisbury, worked wonders in organizing an efficient system of justice. In outline it was much what we find under Henry II. There was created a permanent central court at the Exchequer and a corps of justices available not only to sit at the Exchequer but also to make frequent visitations throughout the country. These *justiciaris totius Anglie* supplemented and in large measure supplanted the local justice, but they were administrators rather than lawyers, and the jury—though as an institution more than a century old, if not much older—was in an early stage of its evolution. The course of events under Stephen is obscure, but there can be no doubt that the administration of justice went to pieces. Henry II's persistence in denying validity to any of Stephen's acts and an inevitable loss of documents meant a break in continuity that will leave historians always in ignorance. There can, however, have been little worth continuing in the make-shift arrangements which were all that were possible in a politically divided country. Henry II insisted upon getting back to the conditions of his grandfather's day. He was more than successful in this, for his ministers developed a judicial system in advance of anything yet known in England or on the continent. The judges became more professional; the jury became organised and flexible. It took twelve years and more to achieve this, for the first experiment—we can hardly call it more—of 1166 was not a successful trial of an imperfect organisation. Not until 1168 were Henry II's reforms put upon a firm basis. With effective machinery available for the enforcement of the law, the writs already available and to be invented could be systematised step by step, but the process occupied another decade.

It is evident that there was no master plan from the beginning: one expedient followed another, always resting upon precedent, but so contrived as to fit into what has the appearance of a predestined place in a scheme of actions. Luck or cunning? Perhaps Roman law had its influence, but rather as an inspiration than as a source of substantive law. It is no longer possible to see—as was for long believed—an affiliation between the assize of novel disseisin and the interdict *unde vi*.

It is more certain that the *actio iniuriarum* helped to shape the action of trespass which—explain the omission as we may—finds no place in *Glanville*. There are many parallels between Roman law and the common law, but little evidence of direct borrowing in the twelfth century. The important fact is, however, that the law in *Glanville*, which comes from the last years of Henry III's reign is very new law and, whatever roots it may have in the past, English or Roman, it represents the achievement of little more than twenty years. But while I must obviously agree with Lady Stenton when she stresses the novelty of the writ system as it evolved in Henry II's reign, I differ from her by agreeing with Mr. van Caenegem that the earliest writs giving seisin or requiring reseiisin—to take these as examples—are the ancestors of the later writ of novel disseisin. The concept of law did not change; but the means, and therefore the method, of giving effect to that concept did change.

The evil genius that dogged John's footsteps all his life brought to an end the system created by Henry I and Roger of Salisbury. The loss of Normandy rendered the office of justiciar an anomaly, though it took a generation for the grim fact to be realised and the office did not finally lapse until 1234. John's foolish quarrel with the barons led, curiously enough, to the preservation of what was, in effect, the justiciar's court when the justiciar himself disappeared. John, of course, repudiated the concessions he had made to the barons when granting the Great Charter, among them his acceptance of their demand that common pleas should not follow the king's court but should be held at a definite place—a reference to the practice of the justiciars in previous reigns. Had John lived, it is unlikely that England would ever have known the illogical division of the judicature between the King's Bench and the Common Bench, with the Exchequer still retaining some small share of the common law jurisdiction that the justiciar had formerly exercised. This was part of the price that the supporters of Henry III paid for the boy-king's succession. Though the arrangement endured for six centuries, it cannot be praised as a well planned instrument of justice. Englishmen, however, accepted it, because they became used to it, and they thought so well of it that they transplanted it in Ireland. In 1234 when the courts were reorganised, the writ system, as it evolved since the reign of Henry II, was still young and simple; but it had become integrated in the concept of English justice and no one conceived of any alternative. So the system continued and proliferated and did not improve with growth and age, as an acquaintance with the printed Register of Writs will convince any reader. Perhaps

we should not call this process decadence; but if we wish to see English justice at its best, we would do well to contemplate it before the convulsions of John's reign had twisted and contorted what had been conceived and completed in a land of peace. Think how simple the organisation of justice is as *Glanville* presents it.<sup>4</sup> The treatise is concerned only with the king's court at the Exchequer and the courts of the itinerant justices. Of a court *coram rege* the author takes no notice, for to him a separate and distinct court of that sort is not conceivable. Doubtless if the king were so minded, he might preside over his own court at the Exchequer; but he was rarely so minded, and for most of his time he was out of the country. With an impersonal monarchy, his absence did not mean any diminution in the authority of his courts. A strong justiciar was more than a match even for the mischief-making Count John. Alas! Richard's death brought John to power. Had he been a prudent ruler, he would not have disturbed the simple efficiency of the English courts. But to John prudence was no more than an occasional visitor.

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4. The latest edition, of the hitherto unpublished alpha text, by G. D. G. Hall has an instructive introduction, translation and critical notes (Edinburgh, 1965).